Supreme Court, U.S.
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NO. 86-287

SUPREME COURT OF THE UNITED STATES

CROWN OIL CORPORATION; GRANEX CORPORATION, U.S.A.; and PAN PACIFIC COMMODITIES

Appellants,

vs.

LAPIDUS POPCORN, INC.

Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

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PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION AND MOTION TO DISMISS OR AFFIRM

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PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION

The California Attorney General, on behalf of the State of California, hereby petitions the Court for permission to intervene pursuant to 28 U.S.C. section 2403(b), which provides:

> "In any action, suit, or proceeding in a court of the United States to which a state or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that state affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the state, and shall permit the state to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

The California Attorney General was not a party to the state court action giving rise to this appeal

but appeared as amicus curiae at all stages of the state court proceedings.

The defendants' Jurisdictional Statement on appeal herein states that the "proceeding draws into question the constitutionality of California Business and Professions Code section 16750(a) (as amended in 1978)." The California statute in question provides rights to citizens, businesses and governmental entities under the California antitrust laws and thereby affects the public interest.

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For the foregoing reasons, it is respectfully submitted that the intervention of the California Attorney General in this appeal is proper under 28 U.S.C. section 2403(b).

DATED: September 16, 1986

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MOTION OF THE CALIFORNIA ATTORNEY GENERAL TO DISMISS OR AFFIRM

The California Attorney General, appearing as an intervenor, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the California Court of Appeal without further argument on the grounds that the decision is, in part, not final, and does not present a substantial federal question.

BASIS FOR INTERVENTION

The California Attorney General has petitioned this Court for permission to intervene in this appeal pursuant to 28 U.S.C. section 2403(b).

STATEMENT OF THE CASE

The California Attorney General relies upon appellee Lapidus Popcorn's statement of the case.

INTRODUCTION

Defendants' appeal challenges the decision of the California Court of Appeal affirming the Superior Court's order overruling defendants' demurrer to the complaint in this action. The California Court of

Appeal held that: 1) federal law did not preempt California law, Business and Professions Code section 16750(a), which gives rise to indirect purchaser claims under California's antitrust law, Business and Professions Code section 16700, et seq.; and 2) defendants' claim of violation of due process based on the possibility of duplicative recovery under California law is hypothetical and premature.

The California Attorney General submits that this appeal should be dismissed or, in the alternative, that the decision of the Court of Appeal should be affirmed without further argument, because: 1) the decision of the Court of Appeal is not final under 28 U.S.C. section 1257(2) on the issue of due process, in that plaintiff's damage claims have not been finally decided and therefore defendants' due process concerns are not ripe for decision; and 2) no substantial federal question has been presented, in that the Californa Court of Appeal decision upholding California's indirect purchasers statute does not contravene any federal constitutional or statutory right, law or policy.

THE CALIFORNIA COURT'S DUE PROCESS HOLDING IS NOT A FINAL DECISION

The jurisdiction of the Supreme Court to review the state court decision in this case is based on 28 U.S.C. section 1257(2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * *
>
> "(2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Supreme Court jurisdiction over a state court decision is premised on a final judgment in the state court. The requirement of finality for review of state court decisions is rooted in the concern for judicial economy, comity and federalism:

> "This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only after 'the highest court of the state in which a decision in the suit could be had' has rendered a final judgment or decree." North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159-160 (1973)

In this case, a demurrer has been overruled, thereby allowing plaintiff's state court action to proceed beyond the filing of the complaint. This Court has generally held that such a decision lacks sufficient finality to be appealable. McComb v. Commissioners, 91 U.S. 1 (1876); Meagher v. Minnesota Threasher Mfg.

Co., 145 U.S. 608 (1892); Clark v. Kansas City, 172 U.S. 334 (1899); Gospel Army v. Los Angeles, 331 U.S. 543, 546 (1947).

Since there is no final judgment here, defendants instead assert appellate jurisdiction based on Cox v. Cohn, 420 U.S. 469 (1975) and Flynt v. Ohio, 451 U.S. 619 (1981), which delineate certain exceptions to the requirement of a final judgment, where federal issues are finally decided or are dispositive of the entire case although no final judgment is entered. However, with respect to the due process holding of the California court, defendants reliance upon Cox and Flynt is misplaced.

On the basis of the Cox finality exceptions, defendants argue that the California ruling is final as to the "federal issue" in question. While defendants do not discuss the point, the "federal issue" in question is, in fact, two distinct federal issues which were considered by the California Court of Appeal: preemption and due

process.[1] Only one of these issues, preemption, was, in any sense, the subject of final decision. The California Court of Appeal decided that California's indirect purchasers statute was not in actual conflict with federal law, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), which allows, with certain exceptions, only direct purchasers to recover overcharges under federal antitrust law. The California court then properly found that defendants' due process challenge was premature.

Clearly the California Court did not and could not properly decide defendants' due process claim. As the California Court of Appeal correctly observed:

> "The potential for multiple liability in the present case is sheer

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[1] Defendants' Jurisdictional Statement discusses the merits of their appeal for eight (8) pages and relegates the theory of jurisdiction to a footnote. Their brief footnote cites the holdings in two cases, Cox, supra, and Flynt, supra, without applying them to the actual proceedings in this matter. Under the circumstances, it is extremely difficult to surmise what defendants' arguments are, let alone counter them.

speculation .... There is nothing to show, at the pleading stage of the proceedings, that a duplicative recovery will occur." Appellant's Appendix (App.) p. A-10.

While we do not concede that defendants' due process claims will have any future merit, due process only becomes an issue, if at all, when the California courts fashion specific remedies and thereby construe the indirect purchaser law. California's law has not yet been construed or applied. App. p. A-10; Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15 (1984).[2/]

Defendants' due process claim is similar to the due process claims asserted in eminent domain cases. This Court has held that eminent domain cases involving due process challenges under the Fifth

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2/ In the absence of construction, it cannot be presumed that the state courts will construe a state statute in a fashion that is repugnant to federal laws or the Constitution. Carey v. Sugar, 425 U.S. 73 (1976); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Amendment are final only when every aspect of the "taking" and "compensation" have been litigated. Grays Harbor Logging Co. v. The Fordney Co., 243 U.S. 251 (1917); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); ("The federal constitutional question embraces not only a taking, but a taking on payment of just compensation. . . . [A] state judgment is not final unless it covers both aspects of that integral problem." North Dakota Pharmacy Board v. Snyders Stores, supra, 414 U.S. at 163.)

Defendants' due process claims were not decided below and are premature. Thus, the California Court of Appeal decision on due process is not final under either 28 U.S.C. section 1257 (2) or the Cox exceptions.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question because defendants have not delineated any federal constitutional or statutory rights or policies that are contravened by California's indirect purchaser statute.

The essence of defendants' preemption challenge is the assertion of non-existent federal rights and policies allegedly arising from this Court's decision in Illinois Brick Co. v. Illinois, supra, 431 U.S. 720. Defendants insist that the Illinois Brick decision provides: 1) a federal right to immunity from state law damage actions by indirect purchasers; and 2) a federal right to settle federal antitrust suits free of any disincentives to settlement possibly created by state laws. Finally, on the basis of the holding in Illinois Brick, defendants assert that state court suits by indirect purchasers impermissibly burden the federal courts and undercut direct purchaser recovery.

The federal rights and policies asserted by defendants are essential to their preemption arguments and their position that a substantial federal question now exists. However, as we demonstrate below, there is no foundation for the rights and policies that defendants assert.

It is essential to defendants' preemption argument that an irreconcilable conflict exist here,

that federal remedies and state remedies are unable to co-exist. But defendants postulate a non-existent conflict. They do so by misstating the purposes and objectives of federal law and by assuming a particular construction of yet-to-be construed state law.

Defendants argue that Illinois Brick v. Illinois, supra, 431 U.S. 720, preempts California's indirect purchaser remedy, because that decision creates a federal right to protection from multiple liability. This Court did hold in Illinois Brick that in most instances relief under the federal statute would not impose multiple liability. However, the Court there in no way purported to define or limit the availability of state remedies or defendants' liability under state law. In Illinois Brick the Court was engaged in a limited search for Congressional intent as to the scope of relief under Clayton Act, section 4:

> " . . . but on balance, and until clear direction from Congress to the contrary, we conclude that the Legislative purpose in creating a group

> of private attorneys general to enforce the antitrust laws under section 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge . . ." 431 U.S. at 746.

State laws or remedies were never discussed in Illinois Brick.

The Court's interpretation of the scope of federal relief cannot be read to indicate an intention to preempt state remedies in Illinois Brick. Here, as in Silkwood v. Kerr-McGee, 464 U.S.238 (1984), there is no showing of a Congressional intention to preempt state remedies, and the absence of such a showing is fatal to defendants' claim of preemption. Id. at 255.

The Court's decision in Illinois Brick to bar indirect purchasers from recovering was the incidental consequence of the Court's decision to concentrate the federal remedy in the hands of the direct purchaser, a trade-off tolerated under the federal scheme. This toleration of incidental harm to indirect purchasers can

certainly not be elevated to a federal right protecting defendants from indirect purchasers' suits.[3/] The federal courts have consistently held that a failure to provide relief under a federal scheme cannot be elevated to the status of a federal right or protection which would bar further or differing state regulation, including relief, based on the same conduct. See Exxon v. Governor of Maryland, 437 U.S. 117 (1978).

Defendants' argument that Illinois Brick bars state indirect purchaser suits is based on the existence of an assumed "federal purpose" that does not exist. This Court recently rejected a similarly overdrawn "federal purpose" in Hayfield Northern Ry. v. Chicago & N.W. Transportation, 104 S.Ct. 2610 (1984), where a railroad argued that Minnesota law mandating condemnation in state court by shippers was preempted

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3/ Nowhere in Illinois Brick is such protection discussed or implied. To the contrary, the standing of indirect purchasers to sue is specifically preserved in that decision. Illinois Brick v. Illinois, supra, 431 U.S. at 728, note 7.

by Interstate Commerce Commission procedures established for shipper takeover of railroads. Id. at 2619:

> "Although it may seem unfair to allow a shipper a second bite of the apple in state condemnation proceedings after it has particpated in, and then withdrawn from negotiations under section 10905, that second opportunity does not frustrate the purpose of the federal valuation scheme."

California's indirect purchaser statute is wholly consistent with federal law and policy. State and federal antitrust laws are parallel and concurrent schemes of regulation. See discussion in Salveson v. Western States Bancard Assn. 525 F.Supp. 566, 573, (N.D. Cal. 1981), affd. 731 F.2d 1423 (9th Cir. 1984). Where federal and state governments have concurrent powers to regulate the same conduct, state laws that provide a cumulative, different or harsher remedy are

not preempted, unless the state's power to fashion a remedy is specifically withdrawn by Congress. California v. Zook, 336 U.S. 725, 731 (1949); Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1962); Silkwood v. Kerr-McGee Corp., supra., 464 U.S. 238, 257 (1984); Hayfield Northern Ry. v. Chicago & N.W. Transp., 104 S.Ct. 2610 (1984).

Thus, Illinois Brick does not bar state law remedies which are cumulative of federal remedies. However, even if such state remedies were barred, there is no indication, at present, that such remedies would be imposed. Defendants assert that California law allows cumulative remedies which they describe as "multiple liability." However, it has not been established that California does allow "multiple liability," since California's law has not been construed or applied by the California court. See Union Carbide Corp. v. Superior Court, supra, 36 Cal.3d 15 (1984). "There is nothing to show at this pleading stage of the proceeding that duplicative recovery will occur." App. p. A-10. Rather, the California Court of Appeal has

indicated quite clearly that multiple liability is not likely to occur: "We, as others, are confident that when the threat of double recovery occurs, the trial court will fashion relief accordingly." App. p. A-10.

Defendants claim that "quite apart from the issue of multiple liability, [the] indirect purchaser suits impede settlement, reduce the amount available to direct purchasers and reintroduce the complexity of pass-on calculations that Illinois Brick prohibited." Defendants' reasoning on these issues is flawed, and their assertion of federal policy is without foundation.

Contrary to defendants' view, there is no constitutional right to settle direct purchaser suits free of any disincentives created by state laws. The only authority they cite for this is "federal policy" favoring settlement. Jurisdictional Statement, p. 11. Defendants do not and cannot find support for a federal or constitutional right to settle lawsuits that is of such magnitude that it strikes down remedies that state law has fashioned for those who suffer actual harm.

A natural consequence of our federal system, which creates legislative bodies and court systems with overlapping authority, is that many acts are subject to recovery under more than one set of laws, and these laws are not always identical. If the difficulty of settling a lawsuit subject to concurrent federal and state regulation were a ground for preemption, there could be no such concurrent regulation.

Relying on In re Chicken Antitrust Litigation, 669 F.2d 228 (5th Cir. 1982), defendants argue that compensation of indirect purchaser claims creates an impermissible burden on the federal judiciary and the settlement process, and that the federal claims of direct purchasers have been and will be reduced by compensation of indirect purchasers. In fact, no impermissible burden on the federal courts has occurred or will occur, nor has compensation of direct purchasers been threatened. Indeed, as Chicken illustrates, a federal court can exercise its discretionary pendent jurisdiction over state claims, as appropriate, to effect

just the sort of global settlement that defendants claim is impeded by the state remedy.

Finally, defendants' argument that indirect claims encroach on recovery by the direct purchasers is unsupportable. Defendants do not and cannot show that the California statute in any way diminishes the recovery due to a direct purchaser under federal law. The California court of Appeal foreclosed that possibility:

> "If, for example, the state statute required that all overcharges be paid to indirect consumers, but not direct consumers, there would be a conflict with the federal remedy. However, in the present case, the California statute in no way impinges on recovery of damages by direct purchasers." App. p. A-8 (fn.5).

Defendants argue that in In re Chicken Antitrust Litigation, supra, 669 F.2d 228, settlement funds for direct purchasers were diminished because

indirect purchasers shared in the settlement. This was not the case. The court in the Chicken case recognized that the settlement fund was based upon the claims of the direct and indirect purchasers. Since the magnitude of the fund reflected both sets of claims, both sets of purchasers were compensated. Neither direct or indirect purchasers were taking anything from each other.

In sum, defendants have failed to make a valid argument that any federal right or policy has been contravened by the existence of California's indirect purchaser statute. As a consequence, they have not presented a substantial federal question for this Court to decide.

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CONCLUSION

For the foregoing reasons, the State of California respectfully submits that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Court of Appeal without further argument.

DATED: September 16, 1986

JOHN K. VAN DE KAMP, Attorney General
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CERTIFICATE OF SERVICE BY MAIL

NO. 86-287
SUPREME COURT OF THE UNITED STATES

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Appellants,
vs.
LAPIDUS POPCORN, INC.
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

I, THOMAS P. DOVE, certify:

I am a Deputy Attorney General of the State of California and am filing with this Certificate an executed notice of entry of appearance. My business address is 6000 State Building, San Francisco, California 94102. I served on all counsel required to be served a copy of the PETITION OF THE CALIFORNIA ATTORNEY GENERAL FOR INTERVENTION AND MOTION TO DISMISS OR AFFIRM by causing a copy of this pleading to be placed in envelopes addressed to all counsel listed below. Included on each such envelope was a copy of an appearance form for JOHN K. VAN DE KAMP, Attorney General of the State of

California; ANDREA SHERIDAN ORDIN, Chief Assistant Attorney General; SANFORD N. GRUSKIN, Assistant Attorney General; THOMAS P. DOVE, Deputy Attorney General, 6000 State Building, San Francisco, California 94102; telephone: (415) 557-0357; AND SPIEGEL CUTLER LIAO & KAGAY: PATRICIA A CUTLER, Three Embarcadero Center, Suite 660, San Francisco, California 94111; telephone: (415) 956-5959.

Each said envelope was then, on September 18, 1986, sealed with postage fully prepaid and deposited in the United States mail at San Francisco, California.

Executed on September 18, 1986 at San Francisco, California.

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